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Nos. 701 and 713—October Term, 1955

In the Supreme Court of the United States

OCTOBER TERM, 1956

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, APPELLANT

v.

CLARICE B. COVERT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, W. VA., PETITIONER

v.

WALTER KRUEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR APPELLANT AND PETITIONER FOLLOWING REARGUMENT

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Except for the brief period under the statute of 1799, at which time persons in the Navy were subject to court-martial for murder committed within the United States, the 1863 statute was the first to make murder *within the United States* subject to trial by court-martial. Since 1800, however, murders committed *outside the United States* by persons connected with that branch of the armed services which was most frequently outside the United States—*i. e.*, the Navy—have been subject to trial by court-martial.

V

THE GOVERNMENT'S POSITION IS THAT CONGRESS HAS AUTHORITY TO MAKE A MILITARY DEPENDENT SUBJECT TO COURT-MARTIAL JURISDICTION WHEN "IN THE FIELD"

The Chief Justice asked the Solicitor General whether, in the Government's view, wives of soldiers based in the United States could be tried in the United States by court-martial. The Solicitor General replied that it was a "question of whether they are in the field" and indicated that Congress would have the constitutional power to subject dependents to court-martial jurisdiction under appropriate circumstances. In view of the apparent misunderstanding of the Government's position by defendants' counsel * we would like to make a brief clarification of the answer to the Chief Justice's question.

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* "Then I must confess I was amazed when the Solicitor General said that it is only a question of legislative judgment that any time Congress wants to subject the good ladies at Fort Myer to trial by courts martial, they can do so." Ward and Paul transcript, p. 70.

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2 Stat. 359 5

2 Stat. 759 12

12 Stat. 602 13

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39 Stat. 655 5

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Articles of War:

Articles of War, adopted by the Continental Congress, on June 30, 1775, 2 J. Cont. Cong. 111; Winthrop, pp. 956-957):

Art. XL 3

LIV 3, 5

It is the Government's position that the constitutional power to make rules for the government and regulation of the land and naval forces gives Congress the power to make subject to court-martial jurisdiction those categories of persons who were then subject to court-martial jurisdiction, under comparable circumstances, and other persons reasonably necessary and proper to the government of those forces. Since wives and other retainers to the camp were then subject to court-martial jurisdiction when in the field, the constitutional power incorporates the then existing concept of "in the field". As demonstrated in our reply brief on rehearing (pp. 41–61), the concept of "in the field" turned on the non-availability of civil courts and on the military posture of a force; prior to 1867 it was never deemed limited to times of hostilities.

In our reply brief on rehearing we stated (p. 56):

> And with the passing of the frontier, the extension of civil jurisdiction throughout the country, and the end of the Indian wars, it is probably true that—barring unusual circumstances—it was no longer possible to be "in the field" in the United States.

It is the Government's position that Congress has the power to subject dependents within the United States to court-martial jurisdiction when "in the field", but that in view of the present general availability of civil courts throughout the United States it would only be under unusual circumstances—such as invasion, internal chaos, or where the courts were closed

Statutes and Articles of War—Continued

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Articles of War of 1776, adopted by the Continental Congress on September 20, 1776, 5 J. Cont. Cong. 801–802, Winthrop, pp. 968–969):

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During the course of the oral reargument of these cases on February 27, 1957, the Court asked the Solicitor General various questions and requested him to supply the desired information to the Court in memorandum form. This memorandum is submitted in response to those requests.

For the convenience of the Court, we have also incorporated in this memorandum, in printed form, as the first Point, the supplemental memorandum submitted to the Court in mimeographed form on the day of the reargument.

I

ACTS OF THE CONTINENTAL CONGRESS SUBJECTING CIVILIANS TO TRIAL BY COURT-MARTIAL FOR CONDUCT BEFORE A COURT-MARTIAL

The Government's reply brief on rehearing (pp. 58–60) pointed out that on May 19, 1786, the Continental Congress struck language which would have restricted court-martial jurisdiction over persons who refused to testify before a court-martial to those belonging to the forces of the United States. This action was cited to show that the Continental Congress took a broad view of the reach of court-martial power and was willing to subject civilians with a very limited connection with the military to court-martial jurisdiction.

Defendants in their *Further Memorandum*, filed with the Court February 26, 1957 (pp. 2–3), suggest that the legislative action to which we refer did not constitute the adoption of a statute, and they make the further categorical statement that there never was any such statute. However, as we shall now show, the facts are that the Continental Congress repeatedly adopted Articles of War subjecting civilians to trial by court-martial for conduct occurring in the presence of a court-martial, and that the very statute which defend-

ants say never existed was adopted by the Continental Congress and was in effect for eleven years.

The first American Articles of War, adopted by the Continental Congress on June 30, 1775, contained the following two articles authorizing the trial by court-martial of civilians for conduct in the presence of a court-martial:

> XL. *No person whatsoever* shall use menacing words, signs, or gestures in the presence of a court-martial then sitting, or shall cause any disorder or riot, so as to disturb their proceeding, on the penalty of being punished at the discretion of the said court-martial. [Emphasis added]
>
> * * * * *
>
> LIV. *All persons* called to give evidence, in any case, before a court-martial, who shall refuse to give evidence, shall be punished for such refusal at the direction of such court-martial:—. . . [Emphasis added] [2 J. Cont. Cong. III; Winthrop, pp. 956-957][1]

The American Articles of War of 1776, adopted by the Continental Congress on September 20 of that year, contained two similar articles, also subjecting civilians to court-martial jurisdiction. These were Articles 6 and 14 of Section XIV:

> Art. 6. *All persons* called to give evidence, in any cause, before a court-martial, who shall refuse to give evidence, shall be punished for

[1] Article XL was apparently based on Article 16 of the British Articles of 1765 (see Winthrop, p. 944); Article LIV was apparently based on Article 53 of the Massachusetts Articles of War adopted on April 5, 1775 (see Winthrop, p. 952).

such refusal, at the discretion of such court-martial: . . . [Emphasis added]

* * * * *

Art. 14. *No person whatever* shall use menacing words, signs, or gestures, in the presence of a court-martial then sitting, or shall cause any disorder or riot, so as to disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial. [Emphasis added] [5 J. Cont. Cong. 801–802; Winthrop, pp. 968–969]

These Articles of 1776 were in effect on May 19, 1786, when the vote in the Continental Congress to which we referred in our reply brief on rehearing (pp. 58–60) took place. On that day, the Continental Congress considered the following proposed paragraph:

> That all persons *belonging to the forces of the United States,* called to give evidence in any cause before a court martial, who shall refuse to give evidence, shall be punished for such refusal at the discretion of such court martial. [30 J. Cont. Cong. 290, emphasis added]

With the exception of the italicized phrase, this paragraph was identical with Article 6, Section XIV, of the Articles of War then in force, *supra.* The proposal being debated on May 19th was one which would have *reduced* court-martial jurisdiction over civilians by restricting the Article's operation to servicemen. The Continental Congress, however, on that day voted to strike the proposed italicized phrase.

With the exception of the tally of the votes, the full account of this incident as it appears in the Journal

of the Continental Congress is reprinted on page 59 of our reply brief on rehearing. We have made a search and found no further material bearing directly on that particular action of the Continental Congress.

However, twelve days later, the Continental Congress repealed the entire Section XIV of the then Articles of War and adopted new Articles to replace it. No Article along the lines of the one debated on May 19th (or previously included in the Articles of War as Article 6 of Section XIV) was included, but the Articles did include the following:

> Art. 12. *No person whatsoever* shall use menacing words, signs or gestures in the presence of a court-martial, or shall cause any disorder or riot to disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial. [Emphasis added] [30 J. Cont. Cong. 319; Winthrop, p. 973]

Authority to punish civilians for such contempt was continued in every set of Articles of War adopted during the succeeding hundred and fifty years. 2 Stat. 359; Rev. Stat. § 1342; 39 Stat. 655; 41 Stat. 793.

The special significance of the vote of the Continental Congress on May 19, 1786, is that the Congress heard, debated, and rejected a specific proposal which would, in one area, have limited court-martial jurisdiction to those belonging to the armed forces. This vote, taken in peacetime, was to the effect that civilians, too, should continue to be subject to trial by court-martial for refusing to testify. It makes no difference whether the action of the Congress on that

day be considered as operative legislation or not. At the end of that day, the law stood, as it had for eleven years since the 1775 Articles were adopted, that civilians were subject to trial by court-martial for refusing to testify. As the Attorney General later said, "The terms of this article are broad enough to include civilian witnesses, and it was doubtless meant to apply to them." 18 Op. Atty. Gen. 278, 280. See Winthrop, p. 309, fn. 84.

Thus, defendants are wholly mistaken in Point I[2] of their *Further Memorandum* and in their categorical statement that:

> . . . *there never was any such law or statute as the Government sets forth*, with or without the disputed words. [*Further Memorandum*, p. 3.]

The Continental Congress in 1775, and again in 1776, adopted the very language discussed. In 1786, when that statute was still in effect, the Congress voted to strike language which would have restricted the Article's operation to servicemen, and left the Article as it then existed. Moreover, in 1775, in 1776, and again in 1786, the Continental Congress voted laws which made civilians subject to court-martial for various categories of contemptuous conduct committed in the presence of a court-martial.

In sum, in direct contradiction to the defendants' position, the fact is that the Continental Congress repeatedly voted in favor of subjecting civilians to

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[2] Point I is headed: "The Continental Congress Passed No Act Subjecting Civilians to Trial by Court-Martial for Refusal to Testify."

court-martial jurisdiction for conduct before a court-martial. As we have pointed out, in our reply brief on rehearing, this action demonstrates that, at the time the Constitution was adopted, there was a willingness on the part of the Confederation to have the legislature subject civilians where there was a reason to do so and a sufficient connection with the military to court-martial jurisdiction.

II

AS OF DECEMBER 31, 1956, THERE WERE AN ESTIMATED 8,092 DEPENDENTS AND CIVILIAN EMPLOYEES ACCOMPANYING THE ARMED FORCES IN ITALY

In connection with the discussion of the practical problems that would be involved in returning all accused civilians to the United States, Justice Black asked how many American civilians there were in Italy.

Appendix C, page 100, of our reply brief on rehearing, gives the estimated total number of civilians accompanying the armed forces in foreign countries as of December 31, 1956, broken down into categories. Figures are available giving the breakdown by countries for the dependents of the military, for the civilian employees, and for the dependents of the civilian employees. Country-by-country figures are not available for the smaller categories of civilians such as technical representatives, American Red Cross personnel, etc. Personnel are constantly in flux, and it is impossible to be precise. The following table gives the best available data as of December 31, 1956, for the number of civilian employees, military dependents

and civilian dependents in those foreign countries which have over 100 such civilians. It will be noted that in Italy there were some 8,092 civilians consisting of 340 civilian employees, 7,547 military dependents and 205 dependents of civilian personnel.

DEPARTMENT OF DEFENSE

CIVILIAN AND DEPENDENT PERSONNEL BY GEOGRAPHIC LOCATION

Estimated as of 31 December 1956

	Dependents of military	Civilian employees	Dependents of civilians	Total
Germany	162,811	5,467	5,238	173,516
Japan	68,928	6,767	5,112	80,807
United Kingdom	46,614	1,129	395	48,138
France	38,365	2,465	1,208	42,038
Philippines	12,827	519	765	14,111
Ryukyus (Okinawa)	9,929	2,036	1,120	13,085
French Morocco	8,477	1,149	775	10,401
Canada (including Newfoundland and Labrador)	7,863	356	273	8,492
Italy	7,547	340	205	8,092
Bermuda	4,676	393	318	5,387
Libya (Tripoli)	4,514	351		4,865
Spain	3,904	504	358	4,766
Cuba	2,651	232	312	3,195
Formosa (Taiwan)	2,816	23		2,839
Turkey	2,521	142	52	2,715
Azores	2,146	192	306	2,644
Greece (and Crete)	1,231	62	98	1,291
Iceland	191	236	317	744
Iran	431	86		517
Korea	160	353		513
Eritrea	469	21		490
Belgium	392	36		428
Norway	296	24		320
Netherlands	233	29		262
Saudi Arabia	160	29		189
Greenland	140	36		176
Denmark	141	20		161
Pakistan	33	122		155
Portugal	140	12		152
Viet Nam	128	11		139
Venezuela	123	1		124

III

DEPENDENTS ACCOMPANYING THE ARMED FORCES OVERSEAS HAVE COMMITTED A NUMBER OF SERIOUS AND SEMI-SERIOUS OFFENSES REQUIRING THE EXERCISE OF CRIMINAL JURISDICTON

The Chief Justice requested data as to the number of serious and moderately serious cases tried by court-martial which involved dependents, as distinguished from those involving other civilians.

Since 1953, there have been four court-martial trials of dependents for murder; of which two are the cases now before the Court. Of the remaining two, one resulted in an acquittal and one in a sentence of life imprisonment.

The remaining offenses discussed below occurred during the two-year period 1955 and 1956. For this period records are available not only for the general courts-martial but for the lesser courts-martial as well.[1]

There was one trial for voluntary manslaughter in which the two-year sentence was disapproved on review. There was a trial in Germany last year by general court-martial for assault with intent to commit murder. The dependent was found guilty and sentenced to one year's confinement. There have been

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[1] Some records for previous years have been destroyed; others are filed in the Kansas City records depot among general personnel records. In view of the large number of man-days that would be required to locate such records of dependent trials (the Army estimated that one-and-a-half million linear feet of files would have to be searched), it was decided not to endeavor to collect records for years prior to 1955.

three trials by general court-martial for aggravated assault, of which one involved a shooting. These resulted in two acquittals and one six-months' suspended sentence.

In September 1956, a dependent wife was tried by general court-martial in French Morocco for a conspiracy to defraud and for defrauding the United States. The wife had engaged in business as a representative of an automobile agency and wrongfully arranged to have cars brought over at government expense. She was fined $2,000 and confinement until paid, not to exceed six months.

Two minor dependents were tried by court-martial and found guilty of wilfully setting fire to real and personal property. They were each fined $500, reprimanded, and given a six months' suspended sentence.

The following table gives the number of less serious cases in which dependents were tried by court-martial during the two-year period 1955–1956:

Assault and battery (including assault on local citizens)	4
Black market activities	11
Breach of the peace	1
Drunk and disorderly	2
Hit and run driving	1
Drunken driving	3
Reckless driving	1
Driving without a license	4
Speeding	4

The bulk of offenses committed by dependents are dealt with administratively, which accounts for the relatively low rate of criminal trials for this group. The offenses tried by court-martial represent the "hard core" cases for which administrative action has

been deemed inadequate.[4] One other factor should be mentioned. In view of the non-availability of confinement facilities for women overseas, the Army has a fixed policy against short sentences of confinement for women, whether in the service or out. Under this policy, no confinement of less than a year will be approved. AR 600–325, April 16, 1951. Because of this policy, there is a tendency not to court-martial wives except for the most serious offenses, unless it is thought that administrative action would be inadequate and that a fine would be effective.

IV

SINCE 1799 THE UNITED STATES HAS HAD LAWS AUTHORIZING THE TRIAL BY COURT-MARTIAL OF CERTAIN CLASSES OF PERSONS FOR THE CRIME OF MURDER

During the course of the oral argument, Mr. Justice Black inquired of the Solicitor General as to the date when the laws of the United States first authorized trial by court-martial for the offense of murder.

The history of the United States laws subjecting persons to trial by court-martial for murder illustrates that one cannot draw valid conclusions as to the extent of court-martial jurisdiction outside the United States by considering the law applicable within the United States; military jurisdiction has consistently been greater where United States civil jurisdiction was not available.

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[4] That trial by court-martial is used only as a last resort is demonstrated by the disposition of cases arising under foreign law for which the United States has obtained waivers of jurisdiction. Of the 417 such cases last year referred to in our reply brief on rehearing (pp. 66, 69), over 400 were handled administratively.

The Act of March 2, 1799, *An Act for the Government of the Navy of the United States* (1 Stat. 709, 712), established the system of naval courts-martial and provided:

> All murder shall be punished with death.

A year later, on April 23, 1800, new Articles were adopted for the government of the Navy (2 Stat. 45, 48). The Article dealing with murder made two substantial changes. The first of these was to limit the scope of the Article so as not to apply to murders committed within the territorial jurisdiction of the United States where, presumably, civil jurisdiction of the state courts was available. The second change was to expand the court-martial jurisdiction over murder committed outside the territory of the United States so that civilians belonging to government ships, as well as members of the Navy, would be subject to trial by court-martial. The text of the Article is given on page 48 of our reply brief on rehearing.[*]

On June 26, 1812, Congress passed a statute covering the punishment of offenses committed on board private armed vessels during the then-current hostilities (2 Stat. 759). Under this Act, murder committed outside the territorial jurisdiction of the United

[*] As pointed out in that brief, civilian seamen on board revenue cutters, as well as members of the Navy, were subject to trial by *naval* court-martial for murder committed outside the territorial jurisdiction of the United States. In view of this fact, defendants' statement that the "[U. S.] Revenue Cutter Service . . . had no courts-martial of any kind" until 1906 (*Further Memorandum*, p. 10) must be taken with caution. Defendants are obviously not referring to *naval* courts-martial, as distinguished from *Coast Guard* (or *Revenue Cutter Service*) courts-martial.

States by an officer or seaman on board such a private vessel was made subject to trial before a naval court-martial. See 1 Op. Atty. Gen. 177, discussed in our reply brief on rehearing, pp. 49–50.

On July 17, 1862, revised Navy articles were adopted, Article 5 reading as follows (12 Stat. 602):

> 5. The crime of murder, when committed by an officer, seaman, marine, or other person belonging to any public ship or vessel of the United States, without the territorial jurisdiction of the same, may be punished with death by the sentence of a court-martial.

This statute made it explicit that the court-martial jurisdiction over murder committed on public vessels outside the territorial jurisdiction of the United States applied to *any person* belonging to the vessel.

The statute to which Mr. Justice Black referred at the oral argument is that of March 3, 1863 which provided that in time of war, insurrection, or rebellion, murder and other felonies committed by persons in the military service were subject to trial by court-martial (12 Stat. 731, 736). Winthrop (p. 667), explains that this statute was itself designed to meet the problem of the unavailability of American civil courts:

> * * * Its main object evidently was to provide for the punishment of these crimes in localities where, in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority can not be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government.

because of extreme emergency—that troops would be "in the field" within the United States.

Respectfully submitted,

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